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No. 91-453

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether principles of "justice and fairness" require this Court to reverse the decision of the Supreme Court of South Carolina and find a compensable taking of petitioner's property under that State's Beachfront Management Act solely because of the property's diminution in value and without regard to the compelling public safety rationale for the legislation.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members have a vital interest in the legal issues that affect the powers and responsibilities of state and local governments to regulate land use in the public interest.

All states and local governments regulate land use. To give just one pertinent example, following enactment in 1972 of the Coastal Zone Management Act, 16 U.S.C.A. §§ 1451-1464 (West 1985 & Supp. 1991), every coastal State passed legislation designed to protect its shoreline from the hazards resulting from overdevelopment.[1] Many

[1] *See* Ala. Code §§ 9-7-10 to 9-7-20 (1987) ("Preservation, Development, Etc. of Coastal Areas"); Alaska Stat. §§ 46.40.10-46.40.210 (1991) ("The Alaska Coastal Management Program"); Cal. Pub. Res. Code §§ 30000-30900 (West 1986 & Supp. 1991) ("The California Coastal Act of 1976"); Conn. Gen. Stat. Ann. §§ 22a-90 to 22a-113j (West 1985 & Supp. 1991) ("The Coastal Management Act"); *id.* §§ 25-69 to 25-102 ("Flood Control and Beach Erosion") Del. Code Ann. tit. 7, §§ 7001-7013 (1991) ("Coastal Zone Act") *id.* 6801-6812 ("Beach Preservation"); Fla. Stat. Ann. §§ 161.001-161.58 ("Beach and Shore Preservation Act"); *id.* §§ 380.19-380.28 (West 1988 & Supp. 1991) ("Florida Coastal Planning and Management Act of 1978"); Ga. Code Ann. §§ 12-5-210 to 12-5-246 (1991) ("Shore Assistance Act of 1979"); Haw. Rev. Stat. §§ 205A-1 to 205A-49 (1988 & Supp. 1991) ("Coastal Zone Management"); La. Rev. Stat. Ann. §§ 49:213.1-49:214.41 (West. 1987 & Supp. 1991) ("Louisiana Coastal Wetlands Conservation, Restoration, and Management"); Me. Rev. Stat. Ann. tit. 38, §§ 480A-490 (1989 & Supp. 1991) ("Protection of Natural Resources" and "Site Location of Development"); *id.* tit. 38, §§ 1801-1905 ("Coastal Management Policies" and "Coastal Barrier Resource System"); Md. Nat. Res. Code Ann. §§ 8-1001 to 8-1105-1 (1990 & Supp. 1991) ("Shore Erosion Control" and "Beach Erosion Control and Replenishment"); Mass. Gen. Laws Ann. ch. 21A, § 4A (West Supp. 1991) ("Coastal Zone Management Office"); Miss. Code Ann. §§ 49-27-1 to 49-27-69 (1990) ("Coastal Wetlands Protection Law"); N.H. Rev. Stat. Ann. §§ 482-A:1 to 482-A:27 (Supp. 1990) ("Fill and Dredge in Wetlands"); N.J. Stat. Ann. §§ 13:19-1 to 13:19-21 (West 1979 & Supp. 1990) ("Coastal Area Facility Review Act"); N.Y. Envtl. Conserv. Law § 34-0101 to 34-0113 (McKinney 1984 & Supp. 1992) ("Coastal Erosion Hazard Areas"); N.C. Gen. Stat. §§ 113A-100 to 113A-134.3 (1991) ("Coastal Area Management Act of 1974"); Or. Rev. Stat. §§ 196.105-196.990 (1991) ("Wetlands and Rovers; Removal and Fill; Ocean Resources Planning"); R.I. Gen. Laws §§ 46-23-1 to 46-23-21 (1991) ("Coastal Resources Management Council"); S.C. Code Ann. §§ 48-39-10 to 48-39-360 (Law. Co-op. 1987 & Supp. 1990) ("Coastal Tidelands and Wetlands"); Tex. Nat. Res. Code Ann. §§ 33.001-33.176 (Vernon 1978 & Supp. 1992) ("Coastal Public Lands Management

of these statutes specifically address the problem of beach/dune erosion and establish "setbacks" beyond which new construction is generally prohibited.[2]

Defining "property" interests and serious public harms constituting "nuisances" traditionally has fallen within the province of state law. State and local governments

Act of 1973"); Va. Code Ann. §§ 62.1-13.21 to 62.1-13.28 (1987 & Supp. 1991) ("Coastal Primary Sand Dune Protection Act"); Wash. Rev. Code Ann. §§ 43.51.650-53.51.765 (West 1983 & Supp. 1991) ("Seashore Conservation Area").

See also Mich. Comp. Laws §§ 281.601-281.651a (West 1979 & Supp. 1991) ("Protecting Beaches and Sand Dunes"); Wis. Stat. Ann. § 59.971 (1991) ("Zoning of Shorelands on Navigable Waters").

[2] *See, e.g.*, Conn. Gen. Stat. Ann. §§ 22a-94, 22a-106 (West 1985 & Supp. 1990) (requiring permit for construction beyond coastal boundary, which is either the 100 year flood frequency coastal flood zone under the National Flood Insurance Act or a 1,000 foot linear setback from the mean high water mark); Del. Code Ann. tit. 7, §§ 6802, 6805 (1991) (requiring establishment of "building" line beyond which construction is prohibited without permit); Haw. Rev. Stat. §§ 205A-41 to 205A-49 (1988 & Supp. 1991) (shoreline setback policy established to prevent future construction within the "shoreline setback zone," set between 20 and 40 feet inland from the mean high tide line); Me. Rev. Stat. Ann. tit. 38, §§ 435, 439-A(4) (1989 & Supp. 1991) (prohibiting new structures or "substantial expansion" [more than 30%] of existing ones within 250 feet of the normal high water line); Md. Nat. Res. Code Ann. §§ 8-1102, 8-1105.1 (1990 & Supp. 1991) (prohibiting construction within the Beach Erosion Control District, coinciding in general with the west crest of the existing dune); N.J. Stat. Ann. § 13:19-5 (West 1979 & Supp. 1990) (prohibiting construction without a permit in coastal area); N.Y. Envtl. Conserv. Law § 34-0108(3)(a) (McKinney 1984 & Supp. 1992) (Commissioner must establish minimum setback requirement for structures); N.C. Gen. Stat. §§ 113A-113(b)(6)(a), 113A-120(a)(6) (1991) (Coastal Commission to designate areas of environmental concern, including natural-hazard areas such as "sand dunes along the Outer Bank," and to deny permits in such areas where development would "unreasonably endanger life or property"); S.C. Stat. Ann. § 48-39-290 (Law Co-op. Supp. 1990) (no new structures may be constructed in defined coastal zones subject to certain exceptions).

could be seriously disrupted by a departure from the "nuisance" exception or multi-factor test repeatedly applied by the Court to takings claims.

Because this Court's decision will have a substantial effect on matters of great importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[3]

SUMMARY OF ARGUMENT

I.

Federal courts should exercise restraint in their review of claims that state land use regulations constitute takings. As suggested by several decisions of this Court, findings of Takings Clause violations based on state enactments should be made only when "fairness and justice" so require.

A. The Court should not imbue the term "property" with some federal or natural law meaning. The Court cannot find that state regulation effects a taking of property without superimposing on state law some baseline for property rights that the State already has explicitly or implicitly rejected by adopting and sustaining the regulation. It is just this subjective preference in Constitutional rulemaking that the Court has repeatedly warned against in insisting that property rights are created by state law.

B. Petitioner's suggestion that federal courts should exercise *de novo* review over state judgments that certain land uses constitute nuisances would violate longstanding principles of federalism. In view of the lack of consensus concerning what activities constitute a nuisance, such review of necessity would involve intrusive disagreements with state courts' or legislatures' evaluations of the harms

[3] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

and benefits of different activities. In addition, any attempt by this Court to "federalize" an objective standard of harmful or nuisance-like property uses likely would stunt the careful evolution of the common law in response to, among other things, changing scientific understanding of the physical interrelationship between once seemingly distinct activities.

For similar reasons, the Court should not be quick to second-guess a state legislative, executive or judicial determination that a particular police measure is needed to avoid serious injury to public health and welfare. Here, the South Carolina legislature and respondent possess far more expertise than does this Court regarding the peculiar risks caused by construction on fragile areas of the South Carolina coast.

II.

A. Petitioner's request of this Court to abandon the "nuisance" exception to the Takings Clause should be rejected. The "nuisance" exception stands for the simple proposition that a State may prohibit uses of property that are harmful to the community because such uses are not included in ownership rights. The nature of the harm against which the South Carolina statute is directed is well within the class of harms contemplated by this Court in cases applying the "nuisance" exception.

The legislature of South Carolina is intimately familiar with the serious dangers to life and property that are posed by erosion exacerbated by development too close to the shoreline. The Beachfront Management Act explicitly recognizes these harms and also makes clear the close connection between the prevention of beach erosion and the Act's ultimate purpose of protecting life and property.

B. Petitioner's claim that loss of economic viability may result in a finding of an unconstitutional taking without regard to the other factors used by this Court to analyze takings claims also is without merit. Every

takings case decided by this Court has properly inquired into the nature of the government's action.

Here, in view of the compelling state purpose, the statute does not work an unconstitutional taking when analyzed under the "multi-factor" test. Neither the economic impact nor the effect on petitioner's "reasonable investment-backed expectations" outweighs the government's purpose.

C. The only issue petitioner put to the courts below was whether the deprivation of all economically viable use necessarily constituted a taking. The Supreme Court of South Carolina properly rejected this extreme view. Petitioner's failure to challenge the statute's purpose or methodology in the state courts requires affirmance of the decision below on this ground as well.

ARGUMENT

I. SOUND PRINCIPLES OF FEDERALISM COUNSEL RESTRAINT IN REVIEWING CLAIMS THAT STATE LAND USE REGULATIONS CONSTITUTE TAKINGS.

Well-settled principles of federalism counsel restraint in applying federal law notions of property and nuisance to South Carolina's Beachfront Management Act.

A. This Court Properly Looks to State Law to Define Property Rights.

In this case the South Carolina legislature, respondent (a South Carolina administrative agency), and the South Carolina Supreme Court agreed that South Carolina property rights do not include the right to build a permanent structure seaward of a scientifically drawn erosion baseline because doing so causes severe public harm. A contrary determination by this Court would necessarily rest on a ruling that land ownership in South Carolina *does* include this right of hazardous construction. The only available sources for this conclusion are the opinions of

the members of this Court about what ideal property rights should embrace. But it is just this subjective preference in Constitutional rulemaking that the Court has repeatedly warned against in insisting that property rights are created by state law.

In rejecting numerous pleas to expand federal protection of property rights, the Court properly has insisted that property rights are created and defined by state law. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Bishop v. Wood*, 426 U.S. 341, 344 (1976). The federal Constitution itself does not engender any property rights. *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

In *PruneYard*, owners of a shopping center open to the public challenged, on Just Compensation Clause grounds, a provision of the California constitution that permitted individuals to exercise free speech rights on the shopping center premises. In concluding that there was no unconstitutional taking, the Court distinguished the facts in *PruneYard* from the federal government's actions in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), on the ground that "the United States, *as opposed to the several States*, [is not] possessed of residual authority that enables it to define 'property' in the first instance." 447 U.S. at 84 (emphasis added). In so holding, the Court indicated the necessity of affording the States greater leeway than the federal government in the field of land use regulation.

As the Court also observed in *PruneYard*, "[a] State is, of course, bound by the Just Compensation Clause of the Fifth Amendment." *Id.* A State may not manipulate the contours of property law so as to eviscerate the protections afforded by this (or any other) Constitutional provision. Nevertheless, in determining whether certain interests constitute "property" for purposes of the Constitution, this Court is "mindful of the basic axiom that '"[p]roperty interests . . . are not created by the Consti-

tution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (citations omitted). *See also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 518-19 (1987) (Rehnquist, C.J., dissenting) ("We have evaluated takings claims by reference to the units of property defined by state law."). Thus, while a concern for the States' role in defining property rights does not deprive the Court of a role in assessing the fairness of state land use rules, it plainly counsels judicial restraint. As suggested in *PruneYard* itself, findings of Takings Clause violations based on state enactments should be made only when "fairness and justice" so require. 447 U.S. at 83. *See also Armstrong v. United States*, 364 U.S. 40, 49 (1960).

B. The Formulation of Laws Addressing Harmful, Nuisance-Like Uses of Property Is Best Left to The States.

Petitioner argues (Br. 11) that there should be an "objective" federal definition of nuisance-like harms for purposes of Takings Clause litigation. Adoption of such an unprecedented rule would violate long established principles of federalism in several respects.

Given the variations among the States in defining nuisance, adoption of a federal standard would displace state decisionmaking at the core of its traditional power to define property rights and recognize tort actions. A leading authority describes nuisance as an area of law that "straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste." W. Rodgers, *Environmental Law* § 2.4, at 48 (1986). Indeed, the "clearest" statement of nuisance, the Restatement (Second) of Torts, defines an actionable nuisance as the intentional and unreasonable invasion of another's interest in property (Section 822) and then provides (in Section 826):

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
>
> (a) the gravity of the harm outweighs the utility of the actor's conduct, or
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.[4]

Obviously, any dispute will require a court to make loosely guided policy judgments about the comparative magnitudes of harms and benefits of the parties' uses of land. *See* Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). Federal court review thus could not be "objective," but of necessity would involve intrusive disagreements with state courts' or legislatures' evaluations of the harms and benefits of different activities.

Further, the strength of the Nation's common law tradition lies in its contextual application, which partly explains our historical reliance on state law and state courts for its formation. Local determinations are naturally more appropriate for the site-specific and value-laden judgments inherent in the fashioning of nuisance law. As described by the Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), "whether a particular thing is a nuisance is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."

---

[4] Fifteen States have adopted the broad formulation of "unreasonableness" of the Restatement, while virtually all the others employ even vaguer standards that require courts to determine if the defendant's conduct and/or the plaintiff's losses are unreasonable "under all the circumstances." Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 Alb. L. Rev. 189, 234-35 (1990).

For this reason, petitioner's asserted belief (Br. 44) that a residential home cannot be a nuisance is entirely misguided. To be sure, in most places construction of a residential home would not present dangers to human health and safety. But the fragile, ever-shifting ground near the shoreline is not like most places. There, residential homes, like other permanent structures, present acute risks. That their purpose is residential does not render them somehow immune from the physical mechanics of the coastal zone. In short, a residential home may well be a "right thing," but that fact does not obviate the possibility that the physical characteristics of certain properties may render them the "wrong place" for its location. More generally, the fact that the definition of an activity as a nuisance depends so heavily on the context renders illusory the notion of an objective federal standard for nuisance.

Drawing on state sources of nuisance law in the resolution of takings cases is not only necessary, it is also a salutary feature of the common law tradition. It is essential for the life of the common law that States remain free to determine for themselves what kinds of risks will be tolerated under tort-like standards. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991) (the "federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"). Any attempt by this Court to "federalize" an objective standard of nuisance-like harms for purposes of takings litigation likely would stunt the careful evolution of the common law.

For similar reasons, the Court should not be quick to second guess a state legislative, administrative, or judicial

determination that a particular police power measure is needed to avoid serious injury to public health and welfare.[5] Here, the South Carolina legislature as well as respondent South Carolina Coastal Council have had far more experience, and possess far more expertise, than does this Court regarding the peculiar risks caused by construction on fragile areas of the South Carolina coast.[6] South Carolina has had to deal with the personal tragedy associated with unwise development in those areas.[7]

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[5] *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1007; *id.* at 1014 ("[t]he role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow"); *id.* at 1016 n.18 ("[o]ur review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective"); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (citations omitted) ("the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation'"); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) ("we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question"); *Miller v. Schoene*, 272 U.S. 272, 279 (1928) ("[w]hen forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public").

[6] *See* S.C. Beachfront Management Act, 1988 Act No. 634, *codified at* S.C. Code Ann. §§ 48-39-10 *et seq.* (Law. Co-op. Supp. 1990), as amended by 1990 Act No. 607; S.C. Coastal Zone Management Act 1977 Act No. 123, *codified at* S.C. Code Ann. §§ 48-39-10 *et seq.* (Law. Co-op. 1987). After 11 years of experience, and following the advice of a specially-appointed Blue Ribbon Committee, the South Carolina Legislature concluded that the 1977 Act "did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system." S.C. Code Ann. § 48-39-250(4) (Law. Co-op. Supp. 1990).

[7] *See* H. Crane Miller, *Hurricane Hugo: Learning From South Carolina* (1990) *reprinted in Coastal Erosion and Erosion Management: Hearing before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 234-83 (1990) ("Miller") at 39-40.

States such as South Carolina have been compelled to expend massive sums of monies literally to rescue persons, such as petitioner, from the dangers posed by substantial development close to the ocean.[8] Indeed, South Carolina is only one of many coastal States that have adopted laws regulating beachfront development, including the prohibition of building in areas judged to be at too great an erosion risk. *See* notes 1-2, *supra*.[9]

It is also appropriate for the Court to exercise restraint because property owners are not a discrete and insular minority unable to protect their interests in the state political process. Indeed, South Carolina's respect for property rights is evidenced by the fact that the 1988 Act exempted existing construction from its setback requirements. S.C. Stat. Ann. 48-39-290(6)(i)-(v) (Law. Co-op. Supp. 1990). The 1990 Amendments likewise evidence the State's sensitivity to property rights.[10]

This Court has long wisely declined an active role in state land use decisions. In only two cases—both decided in the 1920's—has the Court found takings where state law regulated land use without effecting a physical invasion. In *Nectow*, the Court found violative of due process a zoning ordinance that severely reduced the value of the plaintiff's property for no stated or apparent public purpose. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393

[8] *Miller* at 25-27, 42 (describing the South Carolina Windstorm Insurance Program).

[9] The National Research Council has recommended adoption throughout the Nation of minimum state standards for coastal development. Standards urged by NRC include a prohibition on construction within the 10 year erosion zone and permitting only readily movable structures within the 60 year erosion zone. National Research Council, *Managing Coastal Erosion* 6-7 (1990).

[10] In view of petitioner's failure to avail himself of the rights afforded by the 1990 amendments, *amici* agree with respondent that, as an alternative to affirmance, the Court could dismiss the petition as improvidently granted or remand the case as not ripe for review. *See also* U.S. Br. 8-10.

(1922), reflects the Court's concern about the unfairness of legislation freely transferring to surface owners the very property right to support that they had conveyed to mineral owners in prior bargaining. These opinions eschew mechanical rules in favor of broad principles capable of supporting open ended inquiries into the fundamental fairness of the State's law. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967). Petitioner's treatment of isolated statements in these cases as independent, *per se* federal law requirements for state land use initiatives is seriously mistaken.[11]

II. WHETHER ANALYZED UNDER THE "NUISANCE" EXCEPTION OR THIS COURT'S MULTI-FACTOR TEST, THE APPLICATION OF SOUTH CAROLINA'S BEACHFRONT MANAGEMENT ACT TO PETITIONER'S PROPERTY PASSES CONSTITUTIONAL MUSTER.

A. The Harm Against Which The Beachfront Management Act Is Directed Is Well Within The Class of Harmful Uses Contemplated By The "Nuisance" Exception.

1. *The "Nuisance" Exception Permits States To Prohibit Harmful Uses of Property Without Providing Compensation Even Where No Economic Viability Remains.*

Petitioner asks the Court to disavow a principle that has been an integral part of its takings jurisprudence for more than a century. The central place that the so-

[11] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), involved a permanent physical occupation. *See id.* at 832, quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 n.9 (1982). Because this case does not involve a permanent physical occupation of petitioner's property, *Nollan* is inapplicable. Nonetheless, *Nollan* supports this emphasis on fundamental fairness since the Court focused on the lack of any connection between the State's proclaimed goals and its chosen means, and voiced concern that the means amounted to unjust "extortion." 483 U.S. at 837.

called "nuisance" exception occupies in takings law, however, is due not only to its historicity, but also to the significant function that it serves. As this Court has recognized, one of the highest purposes for which government is organized is the protection of the safety and health of its citizens. *See Mugler v. Kansas*, 123 U.S. 623, 684-85 (1887). The "nuisance" exception embodies the recognition that the Just Compensation Clause in no way jeopardizes the government's observance of this fundamental duty towards its citizens. The exception simply provides that the protection of the public safety and health does not depend upon the ability of the public purse to compensate individuals who use their property to harm the public. Moreover, the "nuisance" exception does not weaken the protections of the Fifth Amendment "since no individual has a right to use his property to create a nuisance or otherwise harm others" and therefore "the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone*, 480 U.S. at 491 n.20.

Numerous cases since *Mugler* have upheld this essential power of state legislatures or local governments to prohibit uses of property that harm others. *See, e.g., Keystone*, 480 U.S. at 490-91; *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272; *Zahn v. Board of Pub. Works*, 274 U.S. 325 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365; *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *Powell v. Pennsylvania*, 127 U.S. 678 (1888); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 144 (1978) (Rehnquist, J., dissenting) ("[a]s early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use").

To be sure, "[t]he nuisance exception . . . is not coterminous with the police power itself." *Keystone*, 480

U.S. at 491 n.20 (citation omitted). Thus, even *amici*, who are dependent upon the principle for the power effectively to govern, recognize that it has limits. Indeed, we generally concur in the United States' assertion (Br. 18-19) that the greater part of the regulatory measures coming within the exception will be those "designed to protect public health and safety from serious harm" rather than those that seek to "confer a *benefit* on adjacent property owners or the public at large." [12]

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[12] While this distinction may have a degree of utility as a narrowing principle, the decisions of this Court do not support the view that it furnishes an invariable definition of which regulatory measures qualify for the "nuisance" exception. Among the decisions that fail to adhere to the United States' proposed rule is *Chicago, B. & O. R. Co. v. Illinois*, 200 U.S. 561 (1906). In that case, the Court was presented with the argument, remarkably similar to that now advanced, that the Court's "adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety." *Id.* at 592. The state action in question was a program designed to secure for the community additional tillable lands fit for agriculture. *Id.* Notwithstanding the argument that the measure did not have "anything to do with the health" of the community, Justice Harlan, writing for the Court, rejected the property owner's position that a "taking" had occurred. *Id.* Because the State's action was designed to "promote the public convenience or the general prosperity," the Court held that the exercise of such power could not be conditioned upon compensation. *Id.* at 592-93.

The Court has indicated in three other decisions that the United States recognizes as consistent with "*Mugler*'s fundamental principles" (Br. 16-17 n.11) that the regulatory restrictions in question were based on the expectation of "widespread public benefit" rather than on "any supposed 'noxious' quality of the prohibited uses." *See Penn Cent.*, 438 U.S. at 134 n.30 (discussing *Hadacheck*, *Miller* and *Goldblatt*). Nevertheless, it is not necessary for purposes of this case to decide whether the nuisance exception extends beyond the "protect[ion] of the public health and safety from serious harm" since the South Carolina Beachfront Management Act easily satisfies even that standard. *See* discussion *infra* at 18-20.

Nevertheless, while the "nuisance" exception does not extend to the limits of a state's police power, it would be irrational to restrict it to measures that prohibit only common law nuisances. Common law nuisance cases address harms imposed by one landowner on his neighbor, whereas police power legislation also can prevent serious harm caused by many landowners, even when the harm is spread over so many people that no one neighbor may have sufficient incentive to bring a nuisance suit.[13] In addition, common law judges lack the expertise effectively to address pervasive, scientifically complex harms to the public within the context of private litigation.[14] If the Court were now to narrow the category of police power legislation immune from Takings Clause challenges to abatement of common law nuisances,[15] it would seriously hamper States in addressing innumerable environmental problems that threaten public health and safety.

Furthermore, contrary to petitioner's suggestion (Br. 20-28), this Court has recognized repeatedly that government may enact laws that result in the "destruction" of private property. *See, e.g., Penn Central*, 438 U.S. at

[13] For example, in the classic case of *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970), the court refused to enjoin air pollution by a defendant in a nuisance suit on the ground that the complexities of reducing air pollution ought to be left to the legislature, which could weigh the costs and benefits of differing rules for society as a whole in light of extensive scientific evidence.

[14] "[N]uisance law could not adequately respond to the problems of air and water pollution. Informational, procedural, and financial barriers would preclude most affected parties from bringing nuisance suits against pervasive nuisances with widespread impact on the general public health and welfare. . . . Due to its inherent limitations, nuisance law generally has been relegated to marginal cases, involving small-scale, localized land use conflicts." Lewin, *supra*, 54 Alb. L. Rev. at 229-30.

[15] The Court, of course, has never done so. The brewery closed in *Mugler* was not itself a common law nuisance; the Court there upheld a state constitutional amendment that reflected a democratic judgment about the social harms of alcoholic beverages.

125, citing *Nectow v. City of Cambridge*, 277 U.S. 183 ("in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that *destroyed* or adversely affected recognized real property interests") (emphasis added); *Miller v. Schoene*, 276 U.S. at 280 ("preferment of [the public interest] over the property interest of the individual, *to the extent even of its destruction*, is one of the distinguishing characteristics of every exercise of the police power that affects property") (emphasis added); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1923) ("destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense"); *Mugler v. Kansas*, 123 U.S at 669 ("the destruction of property which is itself a public nuisance . . . is very different from taking property for public use"); *see also Penn Central*, 438 U.S. at 144 (Rehnquist, J., dissenting) (describing the "nuisance" exception as one of "the two exceptions where the destruction of property does not constitute a taking").

In *Powell v. Pennsylvania*, 127 U.S. 678, for example, a party challenged, on Just Compensation grounds (127 U.S. at 687), legislation that prohibited his manufacture of oleomargarine, and offered to prove

> that for the purpose of prosecuting that business large investments were made by him in the purchase of suitable real estate, in the erection of proper buildings, and in the purchase of the necessary machinery and ingredients; that in his traffic in said article he made large profits; and, if prevented from continuing it, the value of his property employed therein would be entirely lost, *and he be deprived of the means of livelihood*.

Id. at 682 (emphasis added). Notwithstanding this claim, the Court held that the "case, in its important aspects, is

governed by the principles announced in *Mugler* . . . ." *Id.* at 683.[16]

2. *The Beachfront Management Act's Purpose Of Protecting Lives And Property Satisfies the "Nuisance" Exception.*

Shore erosion presents difficult problems for jurisdictions along tidal and Great Lakes shorelines. Currents drive sand along the shore, keeping the beach area unstable.[17] Absent extensive development, erosion is a natural and harmless process of equilibrium between sand and sea.[18] With greatly intensified residential development at the shore,[19] however, erosion can undermine and sometimes destroy structures built too close to the beach, at the same time exacerbating the vulnerability of coastal development to flood damage from hurricanes and other

[16] In *Mugler* itself, the Court characterized the brewery owners' argument as follows:

> [T]hat, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; *as such establishments will become of no value as property*, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose . . . .

123 U.S. at 664 (emphasis added). Thus, in *Mugler*, the Court acknowledged that the result of applying the "nuisance" exception in the circumstances of that case could be the elimination of all economic value of the property. In the Court's view, however, such a result was no obstacle to the enforcement of legislation "appropriate or needful for the protection of the public morals, the public health, or the public safety." *Id.* at 661.

[17] William J. Neal, *et al.*, *Living with the South Carolina Shore* 35 (1984).

[18] Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. Haw. L. Rev. 1, 3-4 (1991).

[19] Rutherford H. Platt, *et al.*, *The Folly at Folly Beach and Other Failings Of U.S. Coastal Erosion Policy*, 33 Env't 7, 8 (Nov. 1991). *See also* David W. Owens, *Where Erosion and Development Meet*, EPA Journal Sept.-Oct. 1989, at 44-45.

major storms.[20] This causes not only property loss, but death and serious injury.[21] Attempts to fortify shorelines against erosion through construction of sea walls, groins and jetties require massive public expenditures and often exacerbate erosion downcurrent from the project.[22] Construction that weakens dune structures also accelerates erosion.[23] When losses occur through floods and undermining, public authorities must provide expensive aid, both through emergency services and reimbursements from the publicly subsidized National Flood Insurance Program, 42 U.S.C.A. §§ 4001-4128 (West 1977 & Supp. 1989), and disaster assistance relief through the Federal Emergency Management Agency.

On the basis of such data, the legislature of South Carolina reasonably determined that building too close to the ocean causes irreparable harm:

> Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

S.C. Stat. Ann. § 48-39-250(6). Moreover, the statute makes clear the close connection between the beach erosion it seeks to prevent and its ultimate purpose of protecting

[20] Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 212 (1991).

[21] *Id.* at 213.

[22] National Research Council, *Managing Coastal Erosion*, *supra*, at 59-60.

[23] Neal, *supra*, at 43-48.

life and property. The beach/dune system, the Legislature found,

> protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner; . . . .

S.C. Stat. Ann. § 48-39-250(1)(a).

While the Act also acknowledges the significance of the State's coastline to the tourist industry, *see* S.C. Stat. Ann. § 48-39-250(8), the Act's "legislative findings" (§ 48-39-250) and "policy statement" (§ 48-39-260) amply demonstrate that there is no basis for petitioner's assertion that "[a]lthough the concern of beach erosion harming private property is mentioned in the Act, . . . this appears to be a remotely-perceived harm." Pet. 40. Indeed, the first item mentioned in both statutory provisions is the State's primary goal of "protect[ing] life and property." *See* Pet. App. 98, 102.

In any event, the fact that the preservation of South Carolina's shoreline likely would have the additional effect of aiding the State's tourist industry provides no basis for requiring compensation. The prohibition on locating stables in the busiest part of Little Rock, Arkansas, that was at issue in *Reinman v. Little Rock*, 237 U.S. 171 (1915), likely enhanced tourism in that City. *See id.* at 174 (City averred that the regulated locality "contain[ed] the largest and best hotels in the state" and that "there is always an offensive odor coming from said stables, to the great detriment of . . . hotel guests"). That additional factor, however, did not deter this Court from concluding that no compensation was due the stable owners to whose property the ordinance was applied. There is no reason for a different result here.[24]

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[24] Likewise, it is difficult to see the logic of the argument suggested by the United States (Br. 20), which would accord significance to the fact that a particular regulation might serve more than one purpose. If it is determined that a regulation does, indeed, bear a rational relation to a valid health or safety purpose, the mere fact that the same regulation may also have other benefits should not be relevant.

B. The Beachfront Management Act Plainly Satisfies This Court's Multi-Factor Test.

1. *This Court's Multi-Factor Test By Definition Takes Into Account More Than Remaining Economic Viability* Vel Non.

Petitioner claims that a regulation that prohibits a landowner from building a permanent dwelling on his property constitutes a taking *solely* because of its effect on the property's market value. However, as the Court explained in *Goldblatt v. Town of Hempstead*, 369 U.S. at 594 (citations omitted), "[a]lthough a comparison of values before and after is relevant, . . . it is by no means conclusive . . . ."

Instead, the Court has established a multi-factor analysis, acknowledging that it

> has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.

Keystone, 480 U.S. at 495 (citations omitted). "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis." *Keystone*, 480 U.S. at 488 (footnote omitted).

Even *Agins v. City of Tiburon*, 477 U.S. 255 (1980), much relied upon by petitioner (Br. at 15-16), states that, "[a]lthough no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests." 447 U.S. at 260-61 (citations omitted).[25] This Court has never invalidated a regulation based solely on its effect on a property's economic viability under *Agins*.[26] Rather, in every takings cases the Court properly examines the goals and methodologies of the regulation. Indeed, in *PruneYard Shopping Center v. Robins*, 447 U.S. at 83, decided the day before *Agins*, the Court employed the same multi-factor test that petitioner's position would require the Court to jettison.

2. *The Compelling Public Interest That Is Served By The South Carolina Statute Outweighs The Other Two Factors Comprising The Multi-Factor Test.*

a. *Character Of The Government Action.*

This Court's multi-factor test also is satisfied by the Beachfront Management Act. The nature of the governmental action in this case is compelling. *See* discussion

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[25] Petitioner concedes (Br. 16) that "the Court has indicated that the two-part *Agins* test should be used only in facial challenges of regulations, while the three-prong *Penn Central* factors should be reserved for cases in which a regulation is challenged as applied to a certain parcel of land (as is true here)."

[26] Indeed, the Court has never invalidated a regulation *solely* because of no remaining economic viability. In *United States v. Lynah*, 188 U.S. 445 (1903), this Court found that a taking for which compensation was required had occurred where the government's obstruction of the natural flow of the Savannah River resulted in the permanent flooding of a privately owned plantation and the total destruction of its value. The Court has explained that its decision in *Lynah* was the result of the fact that "a permanent physical occupation" occurred in that case. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 428.

supra at 18-20. Neither of the other factors that comprise this test outweighs the substantiality of the State's purpose.

b. *Reasonable Investment-Backed Expectations.*

Contrary to petitioner's claims, to provide a basis for "reasonable investment-backed expectations," significantly more is required than passage of legislation like the 1977 Act, which applies generally to the South Carolina shoreline, albeit in a less restrictive fashion than the 1988 Act. Rather, some sort of affirmative act by the government regarding the particular property in question is required to justify reliance by the property owner.

For example, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, the Court held that compensation might be required where an applicant for registration of a pesticide submitted trade secret information to the EPA based on statutory "explicit assurance" of non-disclosure. *Id.* at 1011. In periods where the statute did not provide these guarantees, no compensation was required. *Id.* at 1006-07.

Similarly in *Kaiser Aetna v. United States*, 444 U.S. 164, a private property owner dredged the entrance to a lagoon with the express approval of the Army Corps of Engineers and with the expectation that the lagoon would remain private. When the government declared the lagoon to be a public waterway subject to a navigational servitude, this Court found an unconstitutional taking. Unlike *Monsanto* and *Kaiser Aetna*, there was no such affirmative act by South Carolina in this case that could give rise to any reasonable investment-backed expectations on petitioner's part.

c. *Economic Viability.*

As shown above (pp. 16-17, 21-22, *supra*), petitioner's contention that the economic impact of the regulation is alone determinative is contrary to well-settled law. Even if it were not, however, the trial court's finding that

petitioner's properties were rendered "valueless" (Pet. App. 37) is not conclusive. The trial court focused solely and mistakenly, on the highest and best use of petitioner's property, *i.e.*, the construction of habitable dwellings thereon. *See Goldblatt*, 369 U.S. at 592 (if a regulation "is otherwise a valid exercise of the [government's] police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional").

The trial court erred by failing to consider the worth of the remaining strands in petitioner's bundle of property rights. *Keystone*, 480 U.S. at 497. Specifically, petitioner still can enjoy several other attributes of ownership, including the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ." *Kaiser Aetna*, 444 U.S. at 176. Thus, he can enjoy the privacy and solitude of a beachfront area that was considered so valuable in *Nollan v. California Coastal Commission*, 483 U.S. 825. Petitioner can picnic, swim, camp in a tent or live on the property in a moveable trailer. *See Hall v. Board of Envtl. Protection*, 528 A.2d 453 (Me. 1987) (despite denial of building permit, beneficial and valuable uses of beachfront property remain, such as living in a camper). Based on his right to exclude, petitioner can charge others for the use of his beach. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Whether analyzing a limitation on the right to alienate, to devise, to exclude, or most frequently, to use, this Court has never focused solely on the diminution in value of only one portion of the property's value.[27] To do so would allow challenges to regulations that affect increasingly

[27] *Cf. Hodel v. Irving*, 481 U.S. 704 (1987) (total abolition of right of descent and devise found a taking where the government's purpose of consolidating increasingly divided Indian lands was not accomplished by the regulation).

subdivided property interests. Indeed, if petitioner's theory that a deprivation of all economic viability automatically works a taking were combined with the trial court's bundle-splitting view of what constitutes the property taken, virtually any regulation would be subject to challenge on the ground that the government had deprived a property owner of all economic use of some strand of his property that deserves separate recognition. This Court wisely has never endorsed such a view.

C. Petitioner's Sole Reliance On A "Finding" Of No Remaining Economic Viability Alone Provides A Basis For Affirming The Decision Below.

Petitioner chose not to question the statute in either of the South Carolina courts, relying instead solely on diminished "economic viability."[28] Given that the Court always has insisted that constitutional inquiry in this area requires consideration of the gravity of the public harm being addressed as well as the loss sustained by the owner, petitioner's concessions compel the Court to rule for respondent.[29] The burden of proof applicable to

[28] *See* Pet. App. 4 ("[petitioner] admittedly fails to attack the validity of the Act, and therefore concedes the validity of the legislative declaration of its 'findings' and 'policy' embodied in Sections 1 and 2 of 1988 Act No. 634") (footnote omitted); *id.* at 9 ("[petitioner] maintains that if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, *regardless of any other consideration*") (emphasis added); *id.* at 35 ("[petitioner's] complaint does not challenge the constitutionality of the Beachfront Management Act, nor does it challenge the right of the General Assembly to regulate the use of his property").

[29] The United States urges the Court to remand the case to permit the South Carolina courts to assess the degree of public harm presented by the statute and balance this against the loss to petitioner. But the South Carolina Supreme Court proceeded as it did because petitioner insisted that these considerations were immaterial. Given the applicable burden of proof and the presumption of regularity

takings challenges and the presumption of regularity afforded democratic state decisionmaking require this conclusion.

In order to evaluate the landowners' takings claim in *Goldblatt v. Town of Hempstead*, the Court explained that it "need[ed] to know such things as the nature of the menace against which [the ordinance] will protect, the availability and effectiveness of other less drastic protective steps, and the loss which [the owners] will suffer from the imposition of the ordinance." 369 U.S. at 595. Because of the "dearth of relevant evidence on these points" (*id.*), the Court rejected the landowners' challenge. *Id.* at 596 ("[o]ur past cases leave no doubt that appellants had the burden on 'reasonableness'"). *See also Keystone*, 480 U.S. at 485 (property owners "have not satisfied their burden of showing that the Subsidence Act constitutes a taking").

The Supreme Court of South Carolina, absent challenge by petitioner, correctly presumed the validity of the statute's purpose and the methodology for accomplishing that purpose. Simply put, "debatable questions as to reasonableness are not for the courts but for the Legislature." *Goldblatt*, 369 U.S. at 595 (citation omitted). *See also* cases cited in note 5, *supra*. This presumption in favor of validity places the burden of challenging the statute squarely on petitioner. Petitioner failed to carry that burden.

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that attaches to all validly enacted state legislation, the Court should affirm the decision below.

Although we believe that affirmance is required on this ground, we do not agree with the South Carolina Supreme Court's view that because petitioner conceded that the statute was a valid exercise of the police power he *necessarily* also conceded nuisance. As discussed above (pp. 14-15, *supra*), the nuisance exception is not coterminus with the State's exercise of its police power.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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